United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7678

United States Court of Appeals
FOR THE SECOND CIRCUIT

TEXACO INC.,

Plaintiff-Appellee,

v.

ALLIED CHEMICAL CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE TEXACO INC.

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BRIEF OF PLAINTIFF-APPELLEE

COUNTER STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Where a second-filed action concerning the same subject matter and seeking substantially the same relief as the first-filed action in federal court had been properly removed to a federal district court prior to the time further proceedings therein were enjoined, was the District Court in error in finding that its injunction did not serve "to stay proceedings in a state court" within the meaning of 28 U.S.C. § 2283?

2. Where the second-filed action was brought in a state court in Texas in order to evade the prior orders of the federal district court in New York refusing to transfer its first-filed action to Texas or to dismiss it for failure to join persons needed for just adjudication, was the District Court in error in holding that an injunction against proceeding with the second-filed action was appropriate under 28 U.S.C. § 2283 "to protect or effectuate its judgments"?

3. Where the first-filed action was national in scope and sought equitable relief under the Trademark Laws of the United States, was the District Court in error in holding that an injunction against proceeding with a second-filed action in state court concerning the same parties and some of the same issues in a limited geographic area was appropriate under 28 U.S.C. § 2283 in order to maintain its flexibility and authority to decide the first-filed action and thus was "necessary in aid of its jurisdiction"?

4. Where defendant below did not seek direct review of the earlier order of the District Court denying transfer but instead sought to evade the effect of that order, and where the factors involved in denying transfer are not relevant to the issues concerning the validity of the injunction appealed from, should this Court now grant review of the non-appealable order denying transfer?

COUNTER STATEMENT OF THE CASE

This action was commenced on January 22, 1975 by Texaco Inc. ("Texaco") against Allied Chemical Corporation ("Allied"). In its Complaint (5a-21a), TEXACO, the proprietor of the famous trade name and mark TEXACO and related TE. marks for gasoline and related products, alleged that Allied's use of the notation TEXGAS for gasoline and liquefied petroleum gas ("LPG") constituted trademark infringement, unfair competition and dilution. The Complaint was based on the United States Trademark Act, 15 U.S.C. § 1051 *et seq.*, the New York anti-dilution statute, § 368(d) of N.Y. Bus. Corp. L., the common law and "under

the laws of all the states and territories of the United States". (16a).*

The Prior Orders Of The Court

Plaintiff promptly commenced discovery while defendant's time to move or answer with respect to the Complaint was periodically extended. Then, in June, 1975, defendant moved *inter alia* (i) to dismiss the action for failure to join its wholly-owned subsidiary, Texgas Service Station, Inc. ("TSSI"), which, as a company using the notation TEXGAS for gasoline, was allegedly a person needed for just adjudication** (57a), and (ii) to transfer the action to the United States District Court, Southern District of Texas, in Houston, pursuant to 28 U.S.C. § 1404(a) (23a).

The motions were extensively briefed with the parties submitting numerous affidavits in support of their positions. By Opinion and Order dated September 17, 1975, Judge Pierce denied Allied's motions in all respects (220a-238a). In denying the motion to dismiss, the Court:

> "concludes that complete relief can be afforded in this action solely through jurisdiction over Texaco and Allied; the interests of Texgas Corp. and TSSI, such as they are, are fully and adequately protected by their parent, defendant Allied. There is no possibility that non-joinder will result in multiple liability or inconsistent obligations." (227a-228a).

In denying the motion to transfer, the Court noted that "[t]he gravamen of Allied's transfer motion appears to be the position that a suit in Texas will better allow it to prove

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* References unless otherwise specified are to page numbers in the printed Appendix previously submitted to this Court.

** Defendant further claimed that another wholly-owned subsidiary, Texgas Corp., should also have been joined. However, it conceded that Texgas Corp. was subject to the jurisdiction of the court (67a) and thus based the motion solely on the absence of TSSI.

a yet unpleaded defense of laches" (228a-229a) and that ". . . defendant's laches defense will doubtless rely on facts and circumstances occurring or existing primarily in Texas" (231a). The Court carefully analyzed the factors relevant to a transfer motion and concluded: "Defendant has failed to show affirmatively that the Southern District of Texas would be a more convenient forum than that chosen by the plaintiff" (236a).

Defendant's Commencement of Suit In Texas

Thereupon, on October 2, almost nine months after commencement of the action, Allied served its Answer herein (239a-246a) and, simultaneously therewith, commenced an action for a declaratory judgment in the District Court of Jefferson County, Texas (No. E-102534) against Texaco (282a-290a).

In its Answer herein, Allied made general denials of infringement and affirmatively alleged there was no likelihood of confusion between the two marks (¶ 26, at 244a), and that plaintiff is precluded from recovery by reason of laches, acquiescence and estoppel (¶ 27, at 244a-245a) and that plaintiff is barred by the applicable statute of limitations (¶ 30, at 245a).

In its Petition in the state court in Texas (282a-290a), Allied, joined by its two wholly-owned subsidiaries TSSI and Texgas Corp., made the same allegations raised in Allied's Answer herein, with the exception that the allegations were limited in geographical scope the State of Texas. Thus, the Texas court was requested to enter a judgment declaring that petitioners' use of the mark and designation TEXGAS within the State of Texas had been lawful and proper and did not constitute a colorable imitation of Texaco's Texas trademark registrations or an infringement of Texaco's common law rights in the State of

Texas (Prayer for Relief, ¶¶ 21-22, at 288a-290a). Further, petitioners sought a judgment declaring that Texaco is barred by laches and acquiescence and by the statute of limitations from proceeding against them (Prayer for Relief, 289a-290a).

Significantly, the controversy alleged by Allied to have created its right to proceed with the Texas action was Texaco's institution of the New York Complaint against it. Thus, in its state court Petition, Allied specifically pleaded:

> "19. In January of 1975, . . . Texaco instituted an action for trademark infringement against . . . Allied only in the United States District Court for the Southern District of New York alleging that the use of the mark and designation TEXGAS by . . . Allied is likely to cause confusion in the mind of the public. . . ."
>
> * * *
>
> "21. Accordingly, since . . . Texaco has charged . . . Allied with infringement of its TEXACO trademark, Plaintiffs' [Allied, Texgas Corp. and TSSI] rights in the mark TEXGAS within Texas have been placed in jeopardy, and there exists an actual controversy between the parties as to whether or not Plaintiffs' continued use of the mark and designation 'TEXGAS' constitutes an infringement of [Texaco's] Texas state trademark registration Nos. 1031 and 29,850, in accordance with Texas Bus. Comm. Code 16.26 and common law rights in Texgas in the mark TEXACO or the prefix TEX" (287a-288a).

Plaintiff's Motion For An Injunction

Shortly thereafter, as Texaco's time to answer the Texas Petition approached and as Allied was about to commence discovery in the Texas action, Texaco proceeded to remove the state court case to the United States District Court for

the Eastern District of Texas, Beaumont Division (365a-373a), and moved before Judge Pierce to enjoin Allied from further proceedings in Texas.

Thus, on October 23, counsel for the parties appeared before Judge Pierce and Texaco presented an Order to Show Cause for an Injunction, including a Temporary Restraining Order. Copies of the motion papers had been served on counsel for Allied earlier that day, including the supporting memorandum in which Texaco noted that it was filing a removal petition in the Texas proceeding (270a).

On the express representation of counsel for Allied that all times in the Texas action would be adjourned and that no further action would be forthcoming in the Texas proceeding pending determination of the motion before Judge Pierce (316a), i.e., an agreement to preserve the *status quo* (320a), Texaco agreed to withdrawal of the temporary restraining provisions and Judge Pierce signed the Order to Show Cause bringing on the motion for an injunction (275a-276a).

Notwithstanding its agreement to refrain from taking any action in the Texas case, Allied, while the motion for an injunction was pending before Judge Pierce, moved in the federal court in Texas to remand that case to the state court. No action was taken on the remand motion when, by Order dated November 6, Judge Pierce granted Texaco's motion enjoining Allied from proceeding with the case in Texas (319a-323a). A formal Order for Preliminary Injunction embodying such relief was signed on November 12 (324a-325a). It is from these two orders that Allied now appeals (403a).

STATEMENT OF FACTS

The record below establishes two central facts which are pertinent to this appeal. First, the defendant's concern here is not to proceed with an action in the *state* court in Texas; its only concern is to have this lawsuit tried in Texas instead of New York. Put another way, Allied is not concerned with which court in Texas hears this case; it is concerned only that some court in Texas, and not New York, hear the case.

Second, and corollary to the first, had Judge Pierce granted Allied's motion to transfer this case to Texas, Allied would not have brought suit in the state court there.

We think these facts are apparent and have not been controverted by Allied. For example, Allied brought suit in the state court in Texas only after its motion to transfer was denied (eight months after this case had commenced). Also, when Allied was enjoined from proceeding with the Texas case, it moved to modify the injunction, stating plainly that its motivation in bringing the state court suit was that:

> "Quite simply, Allied sees that it will be a great deal easier to marshall evidence to defeat Texaco's claim in a forum where the TEXGAS mark has been in use" (337a).
>
> * * * * *
>
> "Allied believes it has a *better* chance to win before a Texas jury exposed to the concurrent use of the marks than before a New York jury which is familiar only with the name of Texaco" (338a).

In this connection, we note that Allied seeks only to have a Texas forum decide the case, not a Texas state court forum.

Similarly, on this appeal, Allied does not disguise that its true dissatisfaction is with the order of Judge Pierce refusing to transfer the case to Texas. This is shown by

its suggestion that this Court review the district court's Opinion and Order of September 17, 1975 (228a-238a) which denied transfer and its bald request that this Court proceed to transfer *this* case to Texas. Indeed, Allied devotes a full thirteen pages, more than one third of its brief, in that attempt. Its summation is revealing:

> "Allied requests a review of the question of forum, and a determination dissolving the injunction against any proceedings in Texas, or, alternatively, a transfer of this action to the Southern District of Texas" (Allied Br., at 36).

In short, as far as Allied is concerned, transfer of this case to the federal court in Texas will serve its ends as well as a reversal of the injunction. Maintenance of a case in state court in Texas is not essential to Allied.

ARGUMENT

INTRODUCTION TO ARGUMENT

Allied does not seriously dispute that if 28 U.S.C. §2283 does not stand as a bar to the injunction, then it was validly issued.

As the lower court found (321a-322a), a district court has the power to enjoin parties before it from litigating in another forum. *Meeropol* v. *Nizer,* 505 F.2d 232, 235 (2d Cir. 1974); *Telephonics Corp.* v. *Lindly & Co., Inc.* 291 F.2d 445, 447 (2d Cir. 1961) and cases cited therein; *Montclair Electronics, Inc.,* v. *Electra Midland Corp.,* 326 F. Supp. 839, 843 (S.D.N.Y. 1971). Here, an injunction was appropriate since each action requires a determination of whether TEXACO and TEXGAS are confusingly similar trademarks and of which party has prior rights, *Cresta Blanca Wine Co., Inc.* v. *Eastern Wine Corp.,* 143 F.2d 1012,

1014 (2d Cir. 1944). Moreover, defendant's obvious attempt to circumvent the district court's earlier refusal to transfer the action provides further grounds for granting an injunction, *Coakley & Booth, Inc.* v. *Baltimore Contractors, Inc.*, 367 F.2d 151, 153 (2d Cir. 1966).

The injunction was within the discretion of the district court and was valid, unless the "anti-injunction" statute, 28 U.S.C. §2283, stands as a bar thereto. We will show that the injunction does not violate the spirit or letter of such statute and that the statute is not applicable here. Alternatively, if the statute does apply, we will show that the injunction falls within the exceptions specified in the law.

I.

28 U.S.C. § 2283 IS NOT APPLICABLE TO THIS CASE AND THE INJUNCTION WAS APPROPRIATE

As the Supreme Court stated in *Atlantic Coast Line R. R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970), the rationale behind the enactment of 28 U.S.C. § 2283 was a recognition that "this dual system [state and federal courts] could not function if state and federal courts were free to fight each other for control of a particular case" and it was necessary "to prevent needless friction between state and federal courts" 398 U.S. at 286.

Neither rationale would suggest reversal of the injunction here. At bar, there has been no ruling or review of any sort by the Texas state court and that court no longer has jurisdiction of the matter. Allied merely instituted suit in state court in Texas and Texaco promptly removed the case to federal court there. Accordingly, up to the present time, there has been no friction between state and federal courts. Indeed, it was Allied which sought to create such friction

after it received adverse rulings below. This, of course, is quite unlike the situation which was before the Supreme Court in *Atlantic*. There, the state court had issued and then refused to dissolve an injunction. The impermissible friction was created when, two years later, the federal court prohibited enforcement of the injunction.

As noted above, Allied has no independent desire to invoke the jurisdiction of the state courts in Texas. In its Texas Petition, Allied does not claim it possesses any substantive rights pursuant to a Texas statute. Rather, its action is for a declaratory judgment that it does not violate any of the rights alleged by Texaco in its Complaint herein.*

On these facts, the injunction below merely thwarted Allied's attempts to create state-federal friction. It served to avoid, rather than to provoke, undesirable conflict and is entirely consistent with the spirit of section 2283. *cf.*, *Skolnick* v. *State Electoral Board of Illinois*, 336 F. Supp. 839, 873 (N.D. Ill. 1971) (three judge panel).

A. The Injunction Here Enjoins a Federal, Not a State, Proceeding

On its face, section 2283 does not apply to this case since at the time the injunction issued the Texas action was in federal court by reason of removal. Accordingly, the injunction has never operated to enjoin any state court proceeding.

Defendant argues in effect that this is a formality which may not be used to subvert the statute. But the purpose of the removal was not to subvert the statute, but rather

* In its state court Petition, Allied alleged that "since Defendant Texaco has charged Plaintiff Allied with infringement of its TEXACO trademark, Plaintiffs' rights in the mark TEXGAS within Texas have been placed in jeopardy . . ." (288a).

to assure the impartiality of a federal court, and to assure the determination of the action under the federal law applicable by reason of federal trademark questions, and to protect Texaco's right to have the federal questions determined by a federal court.

Moreover, the fact is that technicalities are indeed important in determining legal consequences under this statute. For example, there is no doubt that had Texaco obtained this injunction an instant before Allied filed its state court Petition, the statute would not apply. *Dombrowski* v. *Pfister,* 380 U.S. 479, 484 n.2 (1965); *Ex Parte Young,* 209 U.S. 123 (1908); *Walter E. Heller & Co., Inc.* v. *Cox,* 379 F. Supp. 299, 304 (S.D.N.Y. 1974); 1A J. MOORE, FEDERAL PRACTICE, ¶0.229 [1], at 2636 (2d ed. 1974). Clearly, this is a technicality; but one which avoids application of the statute. As one reviewer has pointed out, it is rational to make the distinction since:

> "This statute does not purport to resolve every question bearing upon the relationship between federal and state courts. . . . An injunction against the initiation of proceedings though it may represent an unjustifiable lack of confidence in state law or state officials, does not directly impinge upon the state judiciary since the state judge is not yet personally involved in the case." *Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1048 (1965).

Similarly, if the motion for an injunction is filed before the state case is brought, the statute does not apply even though the state case was actually commenced before the injunction issued. *Barancik* v. *Investors Funding Corp. of New York,* 489 F.2d 933 (7th Cir. 1973).

Here, removal had been accomplished simultaneously with the presentation of the motion for an injunction, and on granting the motion, Judge Pierce properly found that

"the Texas action brought by Allied originally commenced in Texas state court, is now in Texas federal court." (321a). Thus, his injunction did not stay a state court proceeding since none was then pending.

Allied contends that this finding is erroneous and that the Texas action must be regarded as in state court. The only authority it cites for this proposition is *Higgins* v. *California Prune and Apricot Grower, Inc.*, 3 F.2d 896 (2d Cir. 1924), which is clearly distinguishable. First, since the 1948 amendments to the removal sections of the Judiciary Code, *Higgins* has become moot. The crucial question in *Higgins* was whether the state court had ever lost jurisdiction of the removed action there. Dealing with the somewhat cumbersome and ambiguous *predecessor* removal statute, this Court noted that:

> "The fact that all proceedings to remand must take place in the federal court does not inevitably imply that the cause has been actually removed until the federal court remands it." 3 F.2d at 898.

This statement has not survived the substantial revisions to the Judicial Code. Today, it is plain that the filing of the petition for removal vests exclusive jurisdiction in the federal court. *Marsh* v. *Tillie Lewis Foods, Inc.*, 257 F. Supp. 645, 647 (D. S. Dak. 1966); *Artist's Representatives Ass'n, Inc.* v. *Haley*, 26 App. Div. 2d 918, 274 N.Y.S. 2d 442, (1st Dept. 1966).* Thus, unlike the situation in *Higgins*, when Judge Pierce issued the injunction herein the Texas action was no longer in state court for any purpose.

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* Professor Moore in discussing the effect of the 1948 amendments on removal practices states that under the present provisions, "Conflict of jurisdiction between the federal and state court is largely eliminated." 1A J. Moore, FEDERAL PRACTICE, ¶0.168[2] at 433 (2d ed. 1974). Prior to 1948, "Lack of definitive boundaries between the power of the state and federal courts over an action, sought to be removed, created friction." *Id.*, at 435. Generally the state court was not required to let go its jurisdiction until a case for removal was made out.

Second, in *Higgins*, the defendant's removal petition was invalid on its face since the attempt to remove had been to the wrong federal district court. This Court then refused to allow the anti-injunction statute to be avoided by a patently unlawful removal which it could, with certainty, characterize as "a subterfuge." 3 F.2d at 898. It is important to note that had the defendant in *Higgins* removed to the appropriate district court, the removal would have been proper and the result in *Higgins* would have been different. Accordingly, even the *dicta* in *Higgins* is restricted to the limited situation where an attempt to remove is *prima facie* improper.

Here, Texaco has practiced no subterfuge but has sought only to have federal questions determined in federal court. The proper procedural steps for removal were taken, and the removal is valid since Allied's state court Petition specifically pleads this New York federal court action as establishing the requisite "actual controversy". (287a-288a). Allied has thus pled, and will have to place before the Texas court, those federal claims asserted herein by Texaco as entitling it to relief against Allied in Texas. By Allied's own pleading in Texas, therefore, it is apparent that its action there arises under the trademark laws of the United States (15 U.S.C. § 1121) and under the federal Judicial Code (28 U.S.C. § 1338), and was properly removed pursuant to 28 U.S.C. § 1441(b).

The propriety of the removal is not before this Court. It suffices to say that the removal here was not a "subterfuge" or patently invalid. Rather, if there has been a subterfuge, it has been performed by Allied in its attempts to subvert the anti-injunction statute to its own ends.

Higgins does not stand against the injunction below. That decree does not enjoin a state proceeding and does not violate 28 U.S.C. § 2283.

II.

IF THE ANTI-INJUNCTION STATUTE IS APPLICABLE, THE INJUNCTION HERE FALLS WITHIN ITS EXCEPTIONS

28 U.S.C. §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Assuming, without conceding, that the injunction does stay proceedings in a state court, then, we submit, it is nonetheless authorized under two of the three listed exceptions.

A. The Supreme Court's Decision in *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers* Supports the Issuance of the Injunction Herein

In the Court below and in its brief herein, defendant has placed heavy reliance on the Supreme Court's decision in *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers, supra.* This reliance is seriously misplaced since, if anything, *Atlantic* supports the issuance of the injunction herein.

The factual situation in *Atlantic* was quite different from that at bar. In light of the Supreme Court's statement there that "the questions are by no means simple and clear, and the decision is difficult," 398 U.S. at 284,* the differences between our case and *Atlantic* are extremely significant.

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* Later in its decision the Court reiterated that "This case is by no means an easy one. The arguments in support of the union's contentions are not insubstantial." 398 U.S. at 296.

In the instant case, no action of any sort had been taken by the state court when the injunction issued. This contrasts sharply with *Atlantic,* where the state court acting under Florida law, had issued and then refused to dissolve an injunction. The federal court's subsequent order (in 1969) directly interfered with enforcement of that two year old injunction and thus violated the purpose of section 2283. This difference between our case and *Atlantic* is important. *cf., Skolnick* v. *State Electoral Board of Illinois, supra,* at 873.

Atlantic is also distinguishable in its discussion of the meaning of the clause "necessary in aid of [the court's] jurisdiction." In *Atlantic,* the majority noted that the railroad could "have based its federal case on the pendent state law claims as well" but refrained from so doing thus leaving the "state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts." 398 U.S. at 295.

It was precisely because the railroad had failed to include the pendent state claims in the federal action that:

> "the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction *necessary* to aid that jurisdiction" 398 U.S. at 296.

Had the railroad included such claims in its federal action, an injunction would have been necessary to aid federal jurisdiction and the result in *Atlantic* would have been different.

Here, the pendent state law claims are within the federal Complaint and under *Atlantic* the injunction was necessary in aid of this Court's jurisdiction.

As noted in *Atlantic:*

> "Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case" 398 U.S. at 295.

In our case, absent the injunction, Allied would have been free to create problems of judicial management and possible conflicting interlocutory decisions which would have seriously impaired this Court's flexibility and authority to decide the issues herein and to fashion appropriate equitable relief. Accordingly, Judge Pierce was correct in finding the injunction necessary to prevent interference with his ability to consider and dispose of this case. (322a-323a.)

For these reasons, we submit that *Atlantic* suggests not the reversal, but the affirmance, of the injunction below.

B. The Injunction is Necessary to Protect Or Effectuate The Orders of the District Court Denying Transfer and/or Dismissal For Failure to Join Allegedly Indispensable Parties

Although Judge Pierce properly found that the Texas action was actually in federal court (321a), he also determined that:

> "This Court has already denied a motion to transfer this case to Texas; an injunction may properly issue to protect the judgment of this Court. 28 U.S.C. § 2283" (322a).

As shown above, Allied's institution of suit in Texas was in direct response to the denial of its motion to transfer

this action to federal court there* and is an undisguised attempt to avoid the impact of that ruling. The record fully supports Judge Pierce's paraphrasing of this Court's decision in *Coakley & Booth, Inc.* v. *Baltimore Contractors, Inc., supra* at 153, that:

> "'It seems obvious from the recitation of the uncolored cold historical facts here recited that [defendant] has attempted to circumvent the U.S. District Court which first obtained control of the litigation between the parties . . . despite an order refusing to transfer the action upon a petition [defendant] itself brought pursuant to 28 U.S.C. § 1404(a)'" (322a).

Allied does not quarrel with this finding. Rather, it argues that the district court's orders denying transfer and dismissal are not "judgments" within the exception to section 2283. However, the law in this circuit is to the contrary.

In *Sperry Rand Corp.* v. *Rothlein*, 288 F.2d 245 (2d Cir. 1961), this Court affirmed an injunction which prohibited the use in a state court proceeding of certain evidence on the ground that the use of the evidence would evade the effect of a discovery order entered in the federal court. The court specifically stated:

> "[W]e hold that the injunction entered by Judge Anderson was necessary to effectuate his earlier order relating to the priority of discovery. Nothing in the concluding phrase of §2283—which authorizes injunctions against state-court proceedings when

* It was also undoubtedly motivated by the simultaneous denial of its motion to dismiss this action for failure to join its allegedly indispensable subsidiary TSSI. Had that motion been granted Texaco would have been forced to bring suit where it could join that subsidiary and survive a motion to transfer. Presumably, a Texas federal court would have provided such a jurisdiction and, in that event, the state court action would not have been filed by Allied.

> necessary 'to protect or effectuate' federal-court judgments—limits its scope to final judgments. The policies which impelled Congress to enact 28 U.S.C. §2283 in order to overrule the decision in Toucey v. New York Life Insurance Co., 1941, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100, apply to interlocutory as well as to final decrees" 288 F.2d at 249.

This holding has been favorably commented upon in *Developments In the Law—Injunctions,* 78 HARV.L.REV. 994, 1051-1952 (1965). Indeed, if the purposes of section 2283 are to be accomplished, there is no reason to make distinctions between judgments and orders, or distinctions based on whether either is appealable. For example, an order granting partial summary judgment should, in appropriate circumstances, be protectible against evasion in a state court. However, such orders are often not appealable since they are not final within the meaning of Rule 54(b), Fed. R.Civ.P., and do not qualify for interlocutory appeal pursuant to 28 U.S.C. §1292. *Cf.,* 6 J. MOORE, FEDERAL PRACTICE, ¶54.02, at 101n.4 (2d ed. 1974).

We submit that *Sperry Rand* is closely in point with the case at bar. Here, as there, the state court suit was brought "to undermine a decision already made by the court." 288 F.2d at 249. Here, as there, the "issues to be presented to the state court were the same as those then pending in the federal court." *Id.* Here, as there, "the very same relief prayed for in the state court could have been granted, upon a showing that it was equitably justified, by the United States District Judge." *Id.* And, here as there, the argument that additional defendants were required who could only be made party to the state court action was properly rejected since an injunction against the existing defendant would be sufficient to bind the rest. 288 F.2d at 249-50.

Defendant cites *Hyde Construction Co.* v. *Koehring Co.,* 388 F.2d 501 (10th Cir. 1968), *cert. denied,* 391 U.S. 905

(1968), for the proposition that a transfer order is not a protectible judgment within the meaning of section 2283. We submit that this constitutes a misinterpretation of *Hyde* and that defendant's quotation from that decision omits critical language. (Allied Br., at 15). When one sifts through the contorted and complicated factual situation in *Hyde,* it becomes clear that the court held only that the particular transfer order there involved did not fall within the exception to section 2283 since it had not been evaded by the continuance of the state proceedings. Full recitation of the relevant passage makes this clear:

> "Koehring argues further that the stay was permissible to protect or effectuate the federal judgment of the Fifth Circuit ordering the transfer to the Northern District of Oklahoma. We have held that the protection-of-judgments exception in §2283 was included within the 1948 revision of the Judicial Code to overcome the effect of the decision in Toucey v. New York Life Insurance Co., 134 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100, and 'to give Federal courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts.' It may be that in some situations the exception extends to interlocutory orders [citing *Sperry Rand*] but we have no reason here to recognize any such exception. The Fifth Circuit decided only where the federal case should be tried under the federal *forum non conveniens* law. *The restraining order against proceeding in the Mississippi state court was expressly vacated by the Fifth Circuit.* The Mississippi proceedings in no way conflict with the decision that the Northern District of Oklahoma is the more convenient federal forum. Our conclusion is that the Oklahoma federal injunction is not within any of the exceptions found in §2283 and consequently is forbidden by that statute." (emphasis added). 388 F.2d at 510.

As the sentence in italics states, the Fifth Circuit, which had issued the transfer order, had also vacated the restraining order against the state proceedings. Obviously then, the transfer order did not need to be protected against, and was not being evaded by, the state proceedings, and the Tenth Circuit did not have to consider whether a transfer order could be a judgment within the meaning of section 2283.

Similarly, the decision in *Commerce Oil Refining Corp.* v. *Miner,* 303 F.2d 125 (1st Cir. 1962), far from supporting defendant's contention that a transfer order is not protectible within the statute, actually states that "On occasion protectible rights may be conferred by something short of a final judgment. Cf. Sperry Rand v. Rothlein, 2 Cir., 1861, 288 F.2d 245." 303 F.2d at 128. *Commerce* was a diversity action wherein the injunction against a state court action was reversed to allow the state courts to proceed to make a definitive interpretation of the Rhode Island statute of limitations. As the court pointed out, a ruling on this issue by the federal court would have been "at best . . . an 'informed prophecy' as to which line the Rhode Island court would adopt", 303 F.2d at 126, and "no one could seriously suggest that an 'informed prophecy' as to the meaning of a state statute is to be preferred to an 'authoritative decision', let alone that the former is to be protected from the latter." 303 F.2d at 128. In sum, *Commerce* is unlike our case since here there are federal questions to be determined and there is no countervailing rationale which would suggest deference to some special competence of a state court.*

* The only other case defendant cites on this issue is *Carter* v. *Ogden Corp.*, 524 F.2d 74 (5th Cir., 1975). But *Carter* did not involve the protection of any federal court judgment as none had yet issued. The key to that case was the court's finding that it had been "shown no evidence that the Delaware proceedings will interfere with the jurisdiction of the Louisiana Court to hear the case." 524 F.2d at 76. The federal court's orderly disposition of Carter's federal anti-

Moreover, what is involved at bar is the furtherance of Congressional policy enacted as part of the 1948 revisions to the Code and embodied in section 1404(a). As Professor Moore points out, "The broader and more flexible application of the doctrine [of *forum non conveniens* as set forth in section 1404(a)] in the federal system has lessened shopping around in the federal system with its attendant problem of imported litigation and conflicts between federal courts and between federal and state courts." 1A J. MOORE, FEDERAL PRACTICE, pt. 2, ¶ 0.204, at 2206 (2d ed. 1974). The purposes underlying the grant of transfer power in section 1404(a) will be directly undermined if the courts cannot protect their decisions as to where "in the interests of justice" a case should be tried. The power to transfer *vel non* granted by the 1948 Code should be "protectible" within the meaning of section 2283, *see,* 1A MOORE, *supra* at ¶0.208 [3.-4] at 2321; ¶ 0.228 [2], at 2633; *cf., Hoffman* v. *Blaski,* 363 U.S. 335, 348-50, 80 S. Ct. 1084 (1960) (Frankfurter, Harlan and Brennan, J.J., dissenting).

In summary, "A judgment is to be 'protected' from action which would frustrate it." *Commerce Oil Refining Corp.* v. *Miner, supra.* at 127. The injunction below was justified to protect the orders of the district court against defendant's evasion thereof, an evasion which sought to create the very

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trust and breach of contract claims was not impaired or threatened by a Delaware Court's determination of the enforceability of a related covenant not to compete. In any event, the precedential value of this case is gravely undermined as it is based on a legal premise that is clearly erroneous. The court considered that a "federal court on removal under *Erie* sits as another state court in a diversity action." 524 F.2d at 77 n.11. It overlooked the fact that removal legislation is recognized as falling within the first exception to section 2283. *See, Mitchum* v. *Foster,* 407 U.S. 225, 234, 92 S. Ct. 2151 (1972). Thus, contrary to the court's statement, it plainly made a difference whether the case was in federal or state court. The court was further incorrect in reversing the injunction against filing additional suits, since as shown above, section 2283 does not stand as a bar to such relief.

state-federal conflict that section 2283 was designed to avoid. The orders below qualify for protection and effectuation under the statute and the injunction should be affirmed.

C. The District Court Correctly Found That The Injunction "Was Necessary In Aid of Its Jurisdiction," Thus Putting It Within The Second Exception to §2283

The Court below, in its Conclusion of Law No. 6, held:

> ". . . even if the Texas action is considered to be a state action, it is established law that federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 294 (1970)." (322a-323a).

Allied urges this conclusion is erroneous. We submit that it is consonant with the plain language of the statutory exceptions to section 2283 and the holding of *Atlantic.*

The essential facts are not in dispute. This action is properly characterized as *in personam,* and the Court below does have jurisdiction over the parties and the subject matter of Texaco's Complaint. And, as Judge Pierce found, ". . . the action commenced by Allied in Texas court is concerned with substantially the same subject matter and seeks substantially the same relief as the action before this Court." (320a.) Furthermore, Texaco in its first-filed action for infringement of federally registered trademarks and related claims seeks the equitable remedy of an injunction against Allied and those in concert with it, as well as damages.

Allied argues that despite the presence of these factors, the filing of a subsequent state action for a personal judgment involving substantially the same issues does not *necessarily* impair or defeat the previously acquired jurisdiction of a federal court. Were this all that was involved, that might be so. But, here much more is at issue. This is not just a case for money damages. The equitable jurisdiction of the federal district court in New York has been invoked under the federal trademark statutes in order that it might decide on a national basis the right to an injunction determining the right to use the designation TEXGAS, not only in Texas, but in all the fifty states of the United States.*

By restricting the "in aid of jurisdiction" exception solely to *in rem* proceedings, Allied misreads the plain language of §2283 and precedent thereunder including *Atlantic,* see 1A J. MOORE, FEDERAL PRACTICE, ¶ 0.208 [3-4], at 2321 (2d ed. 1974) ("But the second exception in §2283 embraces more than *in rem* cases."). As a result, Allied cuts off its inquiry prematurely, and never reaches the crucial considerations concerning the Court's authority and its flexibility to decide this equity case which formed one basis for issuance of the injunction below.

The majority in *Atlantic,* while finding that no such impairment existed there, was careful to point out:

> "While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfer-

* While Allied stresses here, as it did below, its use of the TEXGAS designation in Texas, it in fact uses the designation TEXGAS in most states east of the Rockies, including New York State where it is currently used within the Southern District. (35a-38a; 191a-192a; 197a-200a).

> ing with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." 398 U.S. at 295.*

Following *Atlantic*, courts in construing the "in aid of jurisdiction" exception have recognized as did the Third Circuit in *Jennings* v. *Boenning & Company*, 482 F.2d 1128, 1132 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1025, 94 S.Ct. 450 (1973) that:

> ". . . overlapping categories of subject-matter competence does not of itself create conflict of jurisdiction in particular cases. Such overlap, however, provides the arena in which such conflicts may occur."

Accordingly, in cases similar to the one at bar, courts have closely scrutinized the areas of conflict to determine whether equitable considerations warranted an injunction.

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* As this quotation makes plain, the "in aid of jurisdiction" exception to §2283 shades into the exception also expressly provided for protecting or effectuating judgments. Thus, while it is convenient to treat these exceptions separately, no clear-cut distinction between the two exists, for as the Fifth Circuit observed in *International Ass'n of Machinists & Aerospace Workers* v. *Nix*, 512 F.2d 125, 1[illegible] 6 (5th Cir. 1975):

> "The second and third statutory exceptions embody much the same concept of protecting the jurisdiction of federal courts. As the Supreme Court stated in the *Atlantic Coast Line* case, the phrase 'necessary in aid of' its jurisdiction implied something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibitions of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case. 398 U.S. at 295, 90 S. Ct. at 1747, 26 L.Ed. 2d at 245-6."

Accordingly, Judge Pierce's order protecting his denial of Allied's transfer motion might equally well be defended as in aid of the district court's jurisdiction without even reaching Allied's contention that his said order is not a judgment within the meaning of § 2283. See, *supra*, p. 17.

American Ins. Co. v. *Lester,* 214 F.2d 578 (4th Cir. 1954) provides an example of an injunction necessary in aid of jurisdiction. There twenty-four insurance corporations brought a federal action against defendants with interests in a coal property seeking a declaratory judgment that the insurance policies involved were invalid due to fraud and also for a declaration of rights to protect plaintiffs from multiple liabilities on the same policies. Two of defendants instituted two actions concerning the same policies in state court and threatened further suits. The Fourth Circuit held that in these circumstances an injunction against the state suits was warranted. The court declared:

> "Without such a power, the granting of a declaratory judgment may well, . . ., fall short of attaining the objectives which are sought in proceedings looking to a declaratory judgment. The power of the court to grant injunctive relief in such cases is not forbidden by 28 U.S.C. § 2283, since the exercise of the injunctive power is not only 'in aid' of the Court's jurisdiction but is essential to its effective exercise." 214 F.2d at 582.

A like conclusion was reached in two pre-1948 cases decided by the Seventh Circuit. *American Optometric Ass'n* v. *Ritholz,* 101 F.2d 883 (7th Cir. 1939), and *Jamerson* v. *Alliance Insurance Co. of Philadelphia,* 87 F.2d 253 (7th Cir. 1937). In both of those cases, the court found equitable factors demanded injunctive relief.

Moss v. *Burkhart,* 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd per curiam sub nom., Williams* v. *Moss,* 378 U.S. 558, 84 S. Ct. 1907 (1964), further demonstrates the court's power under 28 U.S.C. § 2283 when issues based upon the same law are sought to be litigated in a subsequent state court action. In *Moss,* two of the allegations subsequently pleaded in the state court action were of substantially the

same subject matter as that set forth in the federal petition. The court enjoined the party from taking his action to the state court for the following reasons:

> "As the litigation now stands, the intervenors are in courts of two sovereign jurisdictions, alleging substantially the same subject matter and seeking substantially the same relief. The gloss of the pleadings may be somewhat different, but the subject matter of the lawsuits and the relief sought are essentially the same. The jurisdiction of both courts may be conceded, as indeed it is. The decisive point of consideration is that early in the course of this litigation, the intervenors invoked this Court's jurisdiction and consented to its processes. They now seek to circumvent or frustrate that jurisdiction by provoking unseemly state-federal conflict over the same subject matter. In substance, they would remove a case into which they have intervened to another forum. In this posture, it seems important to sensitive areas of this kind that the Court having first acquired jurisdiction of the subject matter should proceed to a final determination of the tedious questions involved. Any attempted division or dual exercise of the concurrent jurisdiction can lead only to unwarranted confusion, and ought to be avoided. We think that the proper administration of justice and the maintenance of a harmonious state-federal relationship require us to restrain the intervenors from taking their lawsuit elsewhere." 220 F. Supp. at 162-163.

Similar equitable considerations support the issuance of the injunction by the Court below. Having elected in moving to transfer to invoke the Court's discretion, Allied is bound by the Court's determination as to the appropriateness of the federal forum in New York. Faced with Allied's attempt to nullify his order, Judge Pierce was fully justified in enjoining further prosecution of the Texas action so as

to uphold and maintain his authority to decide the case. Addressing this point, Professor Moore has stated:

> "Under the Code of 1948 the doctrine of *forum non conveniens* is recognized and the federal district court is given the power to transfer an action to a proper, but more convenient forum. As a consequence of that power and because of the second exception in § 2283 a federal district court should be able to enjoin any proceedings that interfere with its decision as to whether the chosen federal forum is a proper one."

1A J. Moore, Federal Practice, ¶ 0.208, at 2311 (2d ed. 1974).

Similarly, the injunction was necessary to preserve the Court's authority to render equitable relief on federal questions. Judge Pierce properly found that this case is "national in scope" (236a) involving, basically, "trademark infringement in violation of 15 U.S.C. § 1051 *et. seq.* [and] violations of 15 U.S.C. § 1125(a) which prohibits false designation of origin of goods shipped in interstate commerce . . ." as well as claims that "Allied's federal registration of the mark TEXGAS was procured through fraud on the United States Patent and Trademark Office." (221a).

As the Seventh Circuit recently noted, the thrust of the Lanham Act is to give registered trademarks the greatest possible protection nationwide:

> "Trademark statutes prior to the Lanham Act treated the substantive law of trademarks as primarily a state law matter. In enacting the Lanham Act Congress intended to unify trademark law on a national basis. The Senate Committee Report on the Act stated:
>
> > 'there can be no doubt under recent decisions of the Supreme Court of the constitutionality of a national act giving substantive as distinguished

> from merely procedural rights in trade-marks in commerce over which Congress has plenary power * * * a sound public policy requires that trade-marks should receive nationally the greatest protection that can be given.' Sen. Rep. No. 1133, 79th Cong., 2d Sess. (1946), reprinted in Robert, supra at 265, 269 (1947)'."

Union Carbide Corp. v. *Ever-Ready Inc.*, 531 F.2d 366, 376 (7th Cir. 1976); *see also Mister Donut of America, Inc.* v. *Mister Donut, Inc.*, 418 F.2d 838, 844 (9th Cir. 1969).

While there may be concurrent jurisdiction in the state courts, the protection of public policy and of plaintiff's federal rights strongly mitigates against a piecemeal state by state determination of these federal issues. The second-filed state court action does not seek a nationwide determination of rights, but merely a determination of rights within the State of Texas alone. That action raises the same issues as the prior-filed action in federal court in New York with the exception that the allegations were limited in geographic scope to the State of Texas. Judge Pierce will have to make an equitable determination of rights nationwide. Indeed, the Texas action appears a deliberate attempt to interfere with an orderly disposition of the issues on a national basis.

Accordingly, the injunction was necessary to preserve the district court's basic authority and jurisdiction to determine the issues presented in the first-filed case. Moreover, it was necessary to preserve the court's flexibility to decide the case. Since the parties, issues and many of the witnesses in the two cases are the same, it is probable that the concurrent exercise of jurisdiction will lead the courts into conflicts in pre-trial stages involving discovery matters.

This is not mere speculation. For example, Texaco's investigators have uncovered evidence of actual confusion at

TEXGAS service stations in Texas, Florida, Tennessee and Mississippi. Texaco has already taken depositions to document such evidence in Florida and has noticed several days of depositions of such witnesses in Texas. Disputes concerning such discovery have already arisen although motion practice has been avoided at this time, principally because of the voluntary "hold" on the case while settlement discussions took place. But now that the case will go forward, such disputes will arise and will involve the intercession of the Court below or of the federal courts in the districts where the depositions are taken. Allied's documented penchant to evade orders with which it disagrees raises the possibility that it would seek to use the state court to circumvent such rulings or to forestall them by a race to the state courthouse with motion practice. Such conflict will inevitably interfere with Judge Pierce's consideration or disposition of this case and thus impair his flexibility and authority to render a decision.

Moreover, the Court below will have to fashion equitable relief involving companies doing business on a national basis. A prior decision by the Texas state court as to rights in the State of Texas alone would not relieve the district court of the responsibility of ruling on the national issues presented or even from receiving much of the same testimony and evidence. But it might well impair Judge Pierce's ability to mold a decree which will grant effective national relief, taking into account the equities involved with different product lines, national advertising (which knows no state boundries), national distribution, and a mobile population, as well as equitable issues such as laches which may have to be determined on a regional (not state) or product line basis. *See, e.g., Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-330, 64 S. Ct. 587 (1944); *United States Jaycees* v. *San Francisco Chamber of Commerce,* 354 F. Supp. 61, 78 (N.D. Cal. 1972), *aff'd,* 513 F.2d 1226 (9th Cir. 1975).

The two cases cited by Allied on this point did not involve such conflict as would necessarily impair the federal court's jurisdiction and are distinguishable on that ground:

> "We do not understand how a state court judgment obtained six years prior to the filing of a claim in federal court can seriously impair the federal court's 'flexibility and authority to decide that case'." *Jennings* v. *Boenning & Co., supra,* 482 F.2d at 1135.
>
> "The policy of the anti-injunction statute, 28 U.S.C. §2283, is to prohibit enjoining of state court suits *except in those situations where the real or potential conflict threatens the very authority of the federal court.* The only conceivable interference here would be an attempt by the state court to determine issues of federal law, a task which it certainly has not as yet undertaken and which in any event would be wholly without effect." *Vernitron Corp.* v. *Benjamin,* 440 F.2d at 105, 108 (2d Cir. 1971) (emphasis added).

Also, in both *Vernitron* and *Jennings,* the parties seeking the injunctions were attempting to get out from under prior adverse state court determinations just the converse of the situation in the instant case.

The injunction below was properly issued as necessary in aid of the district court's jurisdiction. It should be affirmed on this ground as well.

III.

DEFENDANT'S REQUEST THAT THIS COURT REVIEW THE PROPRIETY OF TRANSFER SHOULD BE DENIED

On September 17, 1975, in an extensive and detailed decision, Judge Pierce denied defendant's motion to transfer this action to Texas (220a-238a). Defendant did not then challenge Judge Pierce's order by seeking what review thereof might have been available. Instead, it sought to

evade the consequences of that decision by bringing suit in state court in Texas.

Now, having been rebuffed in its attempt to nullify the prior order, Allied baldly asserts that since that order caused the injunction to be issued, this Court should review the transfer question *de novo!* (Allied Br., at 23).

The request should be denied out of hand for a number of reasons. First, the rule in this circuit is strongly against interlocutory review of transfer orders. *A. Olinick & Sons* v. *Dempster Bros. Inc.,* 365 F.2d 439 (2d Cir. 1966); *Golconda Mining Corp.* v. *Herlands,* 365 F.2d 856, 857 (2d Cir. 1966); *American Flyers Airline Corp.* v. *Farrell,* 385 F.2d 936, 937 (2d Cir. 1967). To our knowledge, this Court has never found there to be such extraordinary circumstances as to warrant issuance of mandamus to rectify a a lower court's decision on transfer. Here defendant does not even suggest that Judge Pierce's order constitutes a clear-cut abuse of discretion and absent such allegation, it is not entitled to review.

Second, review at this late date would not only undermine the rule against such appeals but would also reward Allied's attempt to evade the lower court's orders. Allied should not be permitted to achieve through impropriety and indirection what it would not be entitled to through proper and direct means.

Third, this case does not present grounds for exercising discretionary appellate pendent jurisdiction. There is no reason to grant review since the propriety of the injunction in no way depends on the propriety of the denial of the transfer motion.

The test in this circuit as to the exercise of so-called pendent jurisdiction at the appellate level is whether "review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order."

General Motors Corp. v. *City of New York,* 501 F.2d 639, 648-649 (2d Cir. 1974). This test is not met here since the propriety of the injunction does not turn on whether the denial of transfer was proper. The questions on this appeal are whether section 2283 applies and, if it does, whether the injunction falls within its exceptions. The factors to be considered under section 1404(a) are not at all pertinent to those questions.

The cases defendant cites are not in point. *Semmes Motors Inc.* v. *Ford Motor Co.,* 429 F.2d 1197 (2d Cir. 1970), involved consideration of two orders which had been issued simultaneously, only one of which was appealable. There, this Court undertook to review the non-reviewable order because the lower court's denial of a stay had been directly contrary to the well established rule giving priority to the first-filed action. Because of that error, akin to the "clear cut abuse of discretion" test as to transfer, review was proper. No such consideration is present here. Also, unlike *Semmes,* the order below denying transfer was issued separately from and well prior to the injunction now being appealed.

In *Barber-Greene Co.* v. *Blaw-Knox Co.,* 239 F.2d 774 (6th Cir. 1957), review of the denial of a motion to dismiss or to transfer was granted since, unlike our case, it was integrally bound to the lower court's injunction against prosecution of another action then pending in the district to which transfer had been sought.

We submit that the request for review of the denial of transfer should be denied. If review is granted, we rest on the decision below (220a-238a) and on our papers submitted in opposition to transfer. (95a-133a; 152a-181a; 191a-217a).

CONCLUSION

For the reasons stated above, the injunction below should be affirmed and Allied's request that this Court review the earlier decision below denying transfer should be denied.

Respectfully submitted,

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Service of ~~three~~ five (5) copies of

the within Brief is hereby admitted this

12th day of July, 1976

William K. Gould

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